

No. 15,882 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ANNA VALETTA NOCITA, Claimant of One 1957 Ford  
Thunderbird Automobile, etc.,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Appeal From the United States District Court for the  
Southern District of California, Central Division.

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BRIEF FOR APPELLANT, ANNA VALETTA  
NOCITA.

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Agents of the United States Treasury Department, on November 24, 1956, at Los Angeles, California, arrested one Roland Nocita, the husband of appellant, and at such time seized the 1957 Ford Thunderbird automobile, the subject of this appeal, and also seized from his person the sum of \$2,140.03 [R. 11-12\*]. Separate libels were filed by the United States for forfeiture of the automobile and for forfeiture of the money, upon the grounds that the automobile and money had been used by Roland Nocita in receiving wagers without filing application for a wagering permit and without payment of wagering occupational tax, in violation of Sections 4411 and 4412, Title 26, *United States Code* [R. 3-5, 9-10]. Forfeiture

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\*References to the printed Transcript of Record are referred to herein as "R.", followed by the page numbers to which reference is made.

was asserted under the provisions of Section 7302, Title 26, *United States Code*.

The appellant herein, Anna Valetta Nocita, the registered owner of the automobile and the purchaser thereof [R. 109-110], filed answer and claim to the vehicle [R. 5-7]. Her husband, Roland Nocita, filed answer and claim to the money. The two actions were consolidated for trial [R. 9]. The Court thereafter rendered judgment in favor of the husband with respect to the money seized, but against the appellant with respect to the automobile. It is the judgment in the latter case which is here appealed.

### **Jurisdictional Statement.**

(1) The jurisdiction of the District Court to hear this case is provided in Title 28, *United States Code*, Section 1355.

(2) The jurisdiction of this Court to review the judgment in question is provided in Title 28, *United States Code*, Sections 1291 and 1294(1).

(3) Pleadings necessary to show the existence of jurisdiction:

- (a) The Libel of Information [R. 3-5];
- (b) Answer to Libel of Information [R. 5-7] and Affidavit in support thereof [R. 7-8];
- (c) The Opinion of the District Court [R. 9-15];
- (d) Objections to Findings of Fact, Conclusions of Law and Judgment [R. 16-17];
- (e) Findings of Fact, Conclusions of Law and Judgment [R. 18-24];
- (f) Notice of Appeal [R. 24-25];
- (g) Statement of Points on Which Appellant Intends to Rely on Appeal [R. 146].



## Statutes Involved.

Title 26, *United States Code*, Section 7302:

“It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.”

Title 26, *United States Code*, Section 4401(c):

“Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.”

Title 26, *United States Code*, Section 4412(a):

“Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

Title 26, *United States Code*, Section 7262:

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000."

### Questions Presented.

(1) Is the use of an automobile for transportation in picking up a sum of money, the product of prior wagers, such a use as to constitute it an instrumentality in the "acceptance of wagers," within the meaning of Sections 4401, 4411, 4412 and 7262, Title 26, *United States Code*, so as to render the automobile subject to forfeiture pursuant to Section 7302, Title 26, *United States Code*?

(2) If the answer to (1) is "yes," then was the forfeited automobile sufficiently identified as being the automobile used in picking up the said money?

### Specification of Errors Relied Upon.

(1) The District Court was without jurisdiction to render Judgment in the case;

(2) The Findings of Fact, Conclusions of Law and Judgment are not supported by the evidence;

(3) The Judgment is contrary to law.



## Summary of the Evidence.

It was stipulated that on November 24, 1956, Roland Nocita, who, prior to that time, had been engaged in a wagering transaction, had not, to that date, filed an application for a wagering permit and had not paid the wagering occupational tax [R. 27]. It was further stipulated that on July 18, 1957, Roland Nocita had pleaded guilty to two counts of an indictment charging him with failure to register for and obtain a wagering permit [R. 131-132; Ex. 13]. It was also agreed that Roland Nocita was at all times the husband of the claimant herein [R. 88].

### (1) JAMES P. DONLEY.

I am a special agent with the United States Treasury Department Intelligence Unit, which investigates wagering violations [R. 27-28]. I first saw Roland Nocita on November 20, 1956, in a Ford Thunderbird, 1957, black with a white top, proceeding south on Long Beach Boulevard, at about the intersection of Long Beach Boulevard and Firestone [R. 28]. The car bore a paper license plate, number 0573243 [R. 29]. I followed the car as far as Rosecrans and Lime Avenue and observed it going down Lime Avenue and turning right on San Vicente, where it stopped for a moment and then backed out [R. 30].

The next time I saw Mr. Nocita was approximately six o'clock in the evening of November 24, 1956 [R. 31]. Special Agent Katayama, Special Agent Virgil Crabtree, Deputy Sheriff Gilbert Scholten, Sheriff's Sergeant James Johnson, and Deputy Sheriff Carl Seltzer were with me [R. 31]. I saw a 1957 black Thunderbird parked facing south in about the 6800 block of South Central

Avenue [R. 31]. I did not see Mr. Nocita in the car, but I did see him in custody in the rear seat of one of the deputy sheriff's personal cars [R. 31-32]. Nocita was not arrested by was being detained when I first saw him [R. 32]. Special Agent Katayama and I brought an arrest warrant to Special Agent Crabtree, who handed it to Mr. Nocita [R. 32].

I requested Mr. Nocita to give me the keys to the Thunderbird, so that we could effect the search of it [R. 32]. He did not do so until he was shown the arrest warrant, and at that time obtained the keys from a third party and allowed the search to be made [R. 32]. He said, "I want to take care of my car" [R. 33]. I asked him for the keys to search the car, and he said he did not have them [R. 34]. I asked who had them, and after a lapse of a few minutes he called across to a person on the other side of the street and told him to bring the keys over, that it was all right, and so this man threw the keys over and we searched the Thunderbird [R. 34]. The license number of the Thunderbird we searched was MVY 377 [R. 34]. The plates were metal plates [R. 34]. The Thunderbird was black with a white or cream top, hard top [R. 35]. It was a 1957 car [R. 35].

I later interviewed Nocita in the office of the South Gate Police Department, around 9:40 that evening [R. 35]. Mr. Nocita, Special Agent Crabtree, and myself were present [R. 35]. Mr. Nocita said that he did accept football wagers but that he did not book horse races, and that the money in his possession was for a crap game at the 6800 Club, a smoke shop, that night [R. 36]. He said the markers found in his pockets were not his [R. 36]. About certain pieces of paper, he said, "The markers and the O-sheets are not mine" [R. 37].

He said he was holding them for a person but refused to give the name of that person [R. 37]. He said he was last employed in 1949 as a bartender at the Atlantic Club, in Compton [R. 37]. He said he owned a 1957 Thunderbird in his wife's name, had only made the down payment on it by trading his 1954 Pontiac at Ben Barkley's and was financing both the Thunderbird and a 1957 Ford sedan through a CIT and a PFC, respectively [R. 37]. He said he held the master lease at the smoke shop, paying \$110.00 on the lease, and had formerly subleased it to one Joe Mangiameli, but that, since Mangiameli had been arrested for bookmaking about six months previously, he, Nocita, was stuck with the lease and went there to conduct crap games until the lease was over [R. 38]. The smoke shop referred to is located at 6800 South Central [R. 38].

When asked his occupation, Nocita said, "I more or less invest" [R. 38]. He stated he personally took small football bets from individuals but would re-bet the money with other individuals [R. 38]. He said that he figured he made \$800.00 or \$900.00 a month on his investments, and that is what he reported on his income tax returns [R. 39].

When I observed Mr. Nocita in the car on November 20th, he was alone [R. 39]. I did not see him get out of the car, and as far as I know, he never got out of it [R. 40]. I did not see anyone approach the car at any time [R. 40].

On the occasion at 6:00 P. M. on November 24th, Mr. Katayama and I arrived with a warrant for Nocita's arrest [R. 41]. We did not have a warrant for the seizure of any property, nor did we ever obtain one [R. 41]. The car was directly across the street from Nocita's

place of business when I first observed it [R. 41-42]. The name of the business is the Smoke Shop [R. 42].

When I searched the Thunderbird I found clothing, a golf bag, and some golf balls and clubs, nothing else [R. 44]. I was the person who unlocked the trunk of the car and was the first person to examine it [R. 44]. Mr. Nocita stated that some of the money was not his, but that he had borrowed it that day [R. 45]. At the time the money was removed from Nocita's person, he was sitting in the back seat of the personal automobile of one of the deputy sheriffs and he was handcuffed [R. 46]. He had been under detention less than ten minutes at that time [R. 47]. I did not see Mr. Nocita in the Thunderbird car on November 24th [R. 49].

(2) CARL SELTZER.

I am a deputy sheriff of Los Angeles County, assigned to the vice detail [R. 50]. I was not present on November 24th at the arrest of Mr. Nocita, but I saw him on that date in the back seat of Deputy Scholten's automobile [R. 50]. I was present when the warrant referred to in Mr. Donley's testimony was shown to Mr. Nocita [R. 51]. As Nocita handed the warrant back, he said, "You guys can search me now" [R. 51]. I took part in the search and found numerous pieces of paper, an envelope containing United States currency, and United States currency rolled up in a wad [R. 51]. The pieces of paper which were found are those which have been marked "Exhibits 1 and 2" [R. 52].

I have had special education in vice control, particularly having to do with bookmaking and wagering, have made in excess of two hundred bookmaking investigations, and I have previously testified as an expert witness



regarding bookmakers, how they operate, and their paraphernalia [R. 52-53]. Exhibits 3, 4 and 5 are what are known as scratch sheets, which can be purchased anywhere, two of which I purchased, and one of which was purchased by Special Agent Donley from the National Daily Reporter, the place of publication [R. 53-54]. It is not unlawful to buy a scratch sheet or to possess one [R. 54-55].

My examination of the pieces of paper, Exhibits 1 and 2, indicated that they are betting markers containing symbols and letters denoting the names of horses, bettors or agents, and the amounts wagered on the horses [R. 54-55]. By comparison with Exhibits 3, 4 and 5, I am able to determine that these betting markers contain wagers on horses running at various tracks throughout the United States on Thursday, November 22, and Friday, November 23, 1956 [R. 55]. There is no way of telling whether the bettors received their money or the bookmaker received his money from these sheets [R. 62]. The top sheet of Exhibits 1 and 2 is commonly called an "O-sheet," while the other sheets are called "betting markers" [R. 64]. An O-sheet, in my opinion, denotes the amount of money which comes in to a bookmaker, the amount of money which is to be paid out by a bookmaker, the amount of money that is owed by a bookmaker, and the amount of money that he is to receive [R. 64].

Government's Exhibit 6 is a handwriting exemplar on which the writing is that of Roland Nocita [R. 66].

I observed the Thunderbird parked on Central Avenue on the day of the arrest [R. 67]. It had metal plates, number MVY 377 [R. 67].

To my knowledge, the car had been parked at that place from twelve noon until 6:05 P. M., the time of Nocita's arrest [R. 67]. I watched the automobile during that time [R. 68]. I did not ever see Nocita in the car during that period [R. 68].

During the period from 12 o'clock noon until 6:05 on the day of the arrest, I did not see Mr. Nocita at any time [R. 70]. The location of the Smoke Shop is close to 68th Street and Central Avenue [R. 72]. The address shown as the residence of Nocita on Exhibit 6 of 12411 Gilbert Street, Garden Grove, California, is out of the vicinity of Los Angeles County and is not within my jurisdiction [R. 73]. I believe Garden Grove is in Orange County [R. 73].

On the occasion of the arrest, I was acting in conjunction with the Federal agents and did not make any arrest at all [R. 76-77]. Exhibits 7, 8 and 9 are photostatic copies of checks that were taken from the person of Mr. Nocita on the occasion of his arrest [R. 77-78].

### (3) JOHN J. HARRIS.

It was stipulated that John J. Harris is an expert in the examination of questioned documents [R. 79-80].

I compared the handwriting on Exhibits 1 and 2 with the handwriting on Exhibit 6 and came to the conclusion that the word "Thurs." on the face, in the lower left-hand portion, of the first page of Exhibit 1, and "Thur." that appears on the second page, in the lower left-hand corner of that document, and the "Thur." that appears on the reverse side of the third page of that exhibit were written by the same person that executed the handwriting on Exhibit 6 [R. 81].



On Exhibit 2, there is a printed abbreviation, "F-r-i," which appears in the center portion of the front page of that document, written by the same person [R. 81].

(It was then stipulated that the words "Thurs." and "Fri." are in the handwriting of Mr. Nocita.)

(4) ARTHUR KATAYAMA.

I am a special agent in the Intelligence Division of the United States Treasury Department, which division investigates wagering violations [R. 83]. I saw Mr. Nocita for the first time on November 20, 1956, at about 6:00 P. M., when he was driving north on Long Beach Boulevard in a black and white 1957 Ford Thunderbird [R. 83]. The license number on the Ford Thunderbird which I observed was a paper plate, number 0573243 [R. 84]. There was with me Special Agent Crabtree and a woman deputy sheriff [R. 84]. We trailed Mr. Nocita north on Long Beach Boulevard and he suddenly turned right into an auto court, spun around, came back, and started heading south on Long Beach Boulevard [R. 84]. We trailed him to the vicinity of Manchester and South Long Beach Boulevard, where we lost him at a traffic light [R. 84].

I next saw Mr. Nocita on November 24, 1956, at the time of the arrest [R. 84-85]. I saw the black Thunderbird there and noticed the license number, which was a metal plate, number MVY 377 [R. 85]. I had occasion to check with the California Motor Vehicles and found that MVY 377 was the metal plate issued to the paper plate 0573243 [R. 85].

I saw the car again on November 26, 1956, when I was inventorying it for a seizure report [R. 85]. The Thunderbird seized was the same Thunderbird that I have previously testified about [R. 86].

The legal owner of the automobile was the Universal CIT Credit Corporation and the registered owner was Anna Valetta Ewing [R. 86]. When I saw the car on the 26th, it was in the General Services Administration garage, at 788 North Main Street, Los Angeles [R. 87].

(It was stipulated that Mr. Nocita's driver's license was found by the witness in the glove compartment of the automobile [R. 87; Ex. 10].)

On the occasion that I saw Mr. Nocita on November 20th, I saw him drive a Ford Thunderbird for a few blocks and then lost him [R. 89]. During this period he was alone in the car at all times [R. 89-90]. He stopped for a traffic light but did not get out of the car, nor did anyone approach the car, on foot or otherwise [R. 90].

(5) EDWIN WALKER COMSTOCK.

My occupation is printing and publishing, at 1503 East Olive, in Compton [R. 90-91]. I recognize Roland Nocita as the person I knew as "Fred" [R. 91]. He came to me on business [R. 92].

(6) RUDOLPH F. VINCELLI.

I am the owner of a cocktail bar [R. 92]. I was an agent for Mr. Nocita in the bookmaking business, and also personally bet with him [R. 93]. I was an agent for him in 1956, up to the time I was arrested, at 6:30 at night, some evening in November [R. 93]. I took wagering bets and turned them in to him and got a percentage [R. 94]. If the people won, he would give me the money to pay them off [R. 94-95]. I would take the bets and the money and turn it over to Mr. Nocita during the month of November [R. 95].

I came into personal contact with Mr. Nocita on just one occasion; one evening he came to my place [R. 95].

That was in about the second week of November [R. 95-96]. He was in a black Thunderbird [R. 96]. This is the only time I saw him drive a Thunderbird [R. 96]. He came to collect some money from me which was due from wagering, I paid him, and he left [R. 97]. He did not give me any bets at that time, nor did I give any to him [R. 97].

I was an agent for Mr. Nocita, but I had only seen him one time, so far as "money transaction" is concerned [R. 98]. After I got arrested, I was not his agent any more [R. 98]. I don't remember the exact date, but it was a Friday night in the middle of November that I was arrested [R. 98].

My place of business is 8218 Long Beach Boulevard, South Gate [R. 100]. It was after dark that Mr. Nocita came to my place [R. 100]. The first time I saw him on that occasion he was already in my place of business [R. 100-101]. When he left, I walked to the exit in the rear with him and walked right to the door [R. 101]. I saw him get into an automobile [R. 101]. I am not too familiar with the various makes of automobiles, but I was fascinated by this automobile and thought it was a foreign car [R. 101]. Nocita told me it was a Thunderbird [R. 101]. I observed the color of the car but did not observe whether it had more than one tone [R. 101-102]. I did not look on the inside of the car nor observe the license plates [R. 102]. I have seen Mr. Nocita from time to time in various cars [R. 102]. I never saw the car that he was driving that night before or since that time [R. 102]. I did not observe whether the car had a paper or metal license plate [R. 102].

This was the only occasion on which Mr. Nocita ever came to my place of business to pick up money [R. 103].

He had it coming for football bets which I had made with him for customers of mine [R. 103-104]. I was to receive 25% as my profit, and I had taken my 25% out of the money I paid Nocita [R. 104]. I do not remember how much I received [R. 104], or how much I paid Nocita [R. 103]. I was to receive 25% of the winnings [R. 104]. No one was with Mr. Nocita on this occasion [R. 104]. I knew he was coming on this occasion, as he had called me to let me know he was coming [R. 105]. Nothing else was done on that occasion, except he picked up his part of the winnings [R. 105]. No additional bets were placed [R. 105].

(7) ARTHUR KATAYAMA (RECALLED).

The speedometer reading on the Thunderbird which was seized was 1,158 miles when I looked at it two days after the seizure [R. 106]. It was then at the storage place and not at the place the seizure had been made [R. 106]. The car had been purchased on November 2, 1956, and seized on November 24 [R. 106].

(8) CHARLES M. DOSMANN.

I am office manager for Ben Barkley Motors, a Ford dealership [R. 108-109]. I have produced the records relating to the sale of a 1957 Thunderbird [R. 109]. The car was purchased November 2, 1956, by Anna Valetta Ewing [R. 110]. A paper license number was issued on the car, being number 0573243 [R. 110]. According to our records, the car was serviced on November 23, at which time the mileage was 1,120 miles [R. 111]. Government's Exhibit 12 is the credit application form filed by Anna Valetta Ewing at the time of the purchase of the car [R. 113].



(9) ARTHUR HIGGINSON.

My occupation is a stevedore, employed by the Pacific Maritime Association [R. 114]. I recognize Mr. Nocita, although I don't know his name [R. 114-115]. You have shown me Exhibit 7, which is a photostat of one of my pay checks, and I identify my signature thereon [R. 115]. Roland (Nocita) cashed it for me [R. 115]. I gave it to him at the Smoke Shop and asked him to cash it for me [R. 116]. I gave him the check and got the money and then paid him some bets that I owed him, approximately \$10.00 [R. 117]. I had made those bets a day or two before on the horses [R. 117-118]. I did not make any further bets with him at that time [R. 118]. The Smoke Shop I referred to is on Central Avenue, I think about the 6600 block [R. 118]. I was apparently paid on the 24th, Saturday, and cashed the check on that date [R. 120-121]. The transaction of making the wager and the transaction of paying the wager were both made inside the Smoke Shop [R. 123].

(10) JAMES B. JOHNSON.

I am a deputy sheriff, attached to the Los Angeles County Vice Detail [R. 124]. I saw Mr. Nocita on November 24th and was the first man to reach him when he was apprehended [R. 124]. I had in my company Special Agent Crabtree and Deputy Sheriff Gil Scholten [R. 124]. I first saw Mr. Nocita come out of the Smoke Shop at 6717 Central and start to walk across the street [R. 124]. I saw a black Thunderbird parked across the street [R. 125]. I encountered Mr. Nocita in the alley on 68th Street and Central and told him he was under arrest on the strength of a Federal warrant [R. 125]. Mr. Nocita said, "Don't touch me until I see the war-

rant" [R. 125]. As we were walking across the street he said, "I want you to take care of that car, it is mine," and pointed towards the black and white Thunderbird [R. 126]. I said, "You mean the Thunderbird?", and he said, "Yes" [R. 126].

I had been outside of the Smoke Shop from 12:00 noon to 6:05 [R. 126]. About twenty minutes to a half an hour before the apprehension, I had seen a warrant in the hands of Arthur Katayama, United States Treasury Department [R. 127]. When I placed him under arrest I took him directly across the street to Deputy Scholten's car [R. 129]. During the entire period from 12:00 o'clock noon until I placed him under arrest, I never saw Mr. Nocita either in or around the Ford Thunderbird [R. 130]. The license number of the Thunderbird was a metal plate, number MVY 377 [R. 130].

(11) WALTER O. BARRETT.

My occupation is salesman and bartender [R. 133]. I am acquainted with Mr. Nocita and knew him during the month of November, 1956 [R. 133]. At that time I resided at 14651 South Lime Avenue, in Compton, near the intersection of San Vicente and Lime Avenue [R. 133]. I shared that apartment with Mr. Nocita, who paid part of the rent [R. 134]. My telephone number there was NEvada 6-7892, and I had a second 'phone, which may have been NEvada 6-6321 [R. 134]. I don't know whether 6-7892 was in my name or not [R. 134].

The apartment was rented in my name and I lived there, but I didn't stay there very much, maybe a couple of nights a week, but it was my apartment [R. 135]. I did not use the apartment for any reason other than living [R. 135]. I left at 8:00 in the morning and got home at



10:00 at night when I stayed there [R. 135]. I have a friend in Long Beach that I visit [R. 135]. I accepted football cards and I left them in my apartment [R. 136]. I bet my football card myself, or a few of the boys who worked with me, and left them in the partment [R. 136]. I never did win and was never paid money by anyone [R. 137]. I left money with the cards [R. 137]. Mr. Nocita had a key to the apartment and paid half the rent [R. 137].

Mr. Nocita did not live in this apartment, but to my knowledge had a home in Garden Grove, in Orange County [R. 138]. I know that somebody else other than Mr. Nocita used the apartment during the day [R. 138]. Mrs. Nocita did not use the apartment [R. 138]. I don't know Mrs. Nocita [R. 138], but she was not living there [R. 138]. To my knowledge, Mrs. Nocita was never at the apartment [R. 139].

(12) GILBERT E. SCHOLTEN.

I am a deputy sheriff of Los Angeles County, assigned to the Vice Detail [R. 139]. The Vice Detail investigates bookmaking activities [R. 140]. On November 20th, 1956, I observed Mr. Nocita at the corner of Cole Place and Long Beach Boulevard, in the City of South Gate, California, where he was driving a 1957 Ford Thunderbird, paper plate number 0572343 [R. 140]. I did not follow him [R. 140]. I had occasion to see him again during the course of the day, approximately 10 or 15 minutes later, at the corner of San Vicente and Lime Avenues, in Compton, California [R. 140]. He was in the same Thunderbird when I saw him, and he got out of the car [R. 140]. I believe he was alone at that time, although I am not sure [R. 140-141].

At this point the Government rested its case and, after a colloquy with the Court [R. 141-142], a motion to dismiss the libels on the basis that they were not supported by the law and were not supported by the evidence was withdrawn, and the defendants rested. After arguments by counsel, the case was submitted to the Court for judgment [R. 143].

### Summary of Argument.

Briefly summarized, the argument advanced by the appellant is as follows:

(1) The forfeited automobile was not identified as having been used in the acceptance of wagers;

(2) The act of receiving money, the product of wagers previously made, by one who has not paid the wagering occupational tax, is not *per se* a violation of the Internal Revenue Code;

(3) The use of an automobile as transportation to and from the place where money, the product of wagers previously made, is collected by one who has not paid the wagering occupational tax is not a use of the vehicle in violation of the Internal Revenue Code.

## ARGUMENT.

### I.

#### The Forfeited Automobile Was Not Identified as Having Been Used in the Acceptance of Wagers.

The evidence produced by the Government to sustain its charge that the seized automobile was “used by said Roland Nocita in receiving wagers” consists solely of the testimony of Rudolph Vincelli. As stated by the distinguished trial judge, in his opinion:

“Although Government witnesses placed Roland Nocita in the Thunderbird at various times immediately before the arrest, nevertheless, there is no evidence before the Court that the automobile was used (other than for the transportation of Roland Nocita) in a wagering transaction, except in one isolated instance.

Witness Rudolph F. Vincelli testified that he had placed bets for Roland Nocita and in November, 1956, Roland Nocita came into his place of business to pick up some money due him on some of the bets; that he paid to Roland Nocita the money and after payment had been made that he walked out of the premises with Roland Nocita to a parking lot where Roland Nocita pointed out the Thunderbird automobile as being his car; got into it and drove away. As far as this transaction is concerned the Thunderbird was used to transport Roland Nocita to and from the premises in question for the purpose of collecting money due on a bet. This was the only evidence produced to show the Thunderbird automobile had been used by Roland Nocita when he was engaged in the business of accepting wagers.” [R. 13-14.]

Actually, without the reporter's transcript of the testimony of Vincelli then available, the Court (and, it must be confessed, this counsel) fell into two errors: (1) Nocita did not identify the car he was driving on that occasion as belonging to him (or to anyone else, for that matter); and (2) Vincelli completely failed to identify the car then used as being the same car that was subsequently seized by the agents of the Treasury Department.

All of Vincelli's testimony regarding the identity of the car driven by Nocita is as follows:

"The Court: What kind of a car was he in?

The Witness: He was in a black Thunderbird.

The Court: Do you know what year it was?

The Witness: Well, it was a new car.

The Court: That is all you know, that it was a new car?

The Witness: A new car. You see, I don't drive and I don't know.

The Court: And this is the only time you saw him?

The Witness: Yes, sir.

The Court: And this is the only time you saw him drive a Thunderbird?

The Witness: Yes, sir." [R. 96.]

\* \* \* \* \*

"Q. . . . What time of day was it that Mr. Nocita came to your place of business? A. He came in the evening.

Q. Was it after dark? A. Yes, it was after dark.

Q. Did he come into your place? A. Yes, sir.

Q. That was the first time that you saw him, that he was in your place? A. Oh, no, he has been in my place before.

Q. No. On that occasion did you see him arrive—did you see him outside the door of your place before he came in? A. No, I didn't see him outside my place before he came in.

Q. So the first time you saw him on that occasion, he was already in your place of business; is that correct? A. That's right.

Q. Did you see him leave that evening? A. Yes, sir.

Q. Where were you when he left? A. I was with him. I walked to the rear with him.

Q. You walked to the rear? A. I walked to the rear, to the exit. I got two. I call it the rear.

Q. Did you go outside of the place of business on that occasion? A. Well, I walked right to the door.

Q. And did you see him get into an automobile on that occasion? A. Yes.

Q. You are familiar, of course, with the various makes of automobiles? A. Not too familiar.

Q. But you know one car from another? A. Well, because I was told.

Q. By whom? A. By Mr. Nocita.

Q. What was the conversation? A. Well, I was fascinated by the automobile. I thought it was a foreign car.

Q. And what did you say? A. So that is why he laughed, and told me what it was.

The Court: What did he tell you?

The Witness: He told me it was a Thunderbird.



Q. (By Mr. Campbell): Did you observe the color of the car? A. Yes.

Q. Did you observe whether it had more than one tone? A. I didn't observe that much, no, sir.

Q. Did you observe the color, whether the upholstery was contrasting or a similar color to the outside of the car? A. I didn't look on the inside.

Q. Did you observe the license plates? A. No, sir.

Q. You have seen Mr. Nocita from time to time in various cars, have you not? A. Yes, sir.

Q. Is this the only time you saw him in the car that you refer to as having seen on that occasion?

A. Yes, sir.

Q. You never saw that car before or since; is that right? A. No, I haven't seen it. That was the first time I seen it, that time.

Q. And that was the last time you saw it? A. That's right.

Q. Did you jot down, or do you recall the license number? A. No, sir.

Q. Did you observe whether it had a paper or a metal license plate? A. No, I did not." [R. 100-102.]

Thus, Vincelli's identification is limited to the fact that the car he saw was *black*, that he did not observe whether it had more than one tone, and that Nocita told him the car was a Thunderbird.

On the other hand, the car which was seized, and which is the subject of this action, while also a Thunderbird, was clearly identified by the seizing officers as being two-toned, *i.e.*, a black body with a white top [Special Agent Donley, R. 28-29, 35; Special Agent Katayama,



R. 83]. If Nocita had stated to Vincelli that the Thunderbird he was driving on that occasion was his (Nocita's), then there might have been, as found by the Judge, an inference that it was the seized automobile, despite the difference in identification. But lacking such a statement, and bearing in mind Vincelli's testimony that he had seen Nocita from time to time in various cars, no inference arises that the cars were one and the same.

It is submitted that a black and white car is, at the least, eye-catching. This Court will undoubtedly take judicial notice that many police and other law enforcement agencies use these contrasting colors on their official vehicles for the very reason of such distinctive appearance. Even the most innocent of motorists becomes acutely aware of a black and white car in the immediate vicinity. Certainly Vincelli, with his more than passing glance at the car driven by Nocita, leading him to ask its make, would have noticed such distinctive markings.

Although the libel states that the Ford Thunderbird seized November 24, 1956, is in custody of the Internal Revenue Service, stored in a Government garage, and in the jurisdiction of the District Court [R. 4], it appears obvious that Vincelli either was not called upon by the Government to examine the seized car for purposes of identification, or, having been so called, failed to identify the seized car as being the one observed by him on the occasion concerning which he testified. This conclusion is based upon Vincelli's testimony that he had never seen the car identified before or *since* the one occasion [R. 102].

## II.

### The Act of Receiving Money, the Product of Wagers Previously Made, by One Who Has Not Paid the Wagering Occupational Tax Is Not a Violation of the Internal Revenue Code.

The Libel of Information [R. 3-5] charged that a “certain 1957 Ford Thunderbird automobile . . . had been used unlawfully to further violations of Title 26, *United States Code*, Sections 4411 and 4412, as follows: That said automobile had been used by said Roland Nocita in receiving wagers without filing application for a wagering permit, and without payment of wagering occupational tax, with intent to defraud the United States of said taxes, and in violation of said Sections 4411 and 4412, Title 26, *United States Code*” [R. 3-4].

Title 26, *United States Code*, Section 4411, provides that there shall be imposed a special tax of \$50.00 per year, to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Title 26, *United States Code*, Section 4401(c), provides that each person engaged in the business of accepting wagers shall be liable for and shall pay the tax on all wagers placed with him.

Title 26, *United States Code*, Section 4412(a), provides: “Each person required to pay a special tax under this subdivision shall register with the official in charge of the internal revenue district. . . .”

Title 26, *United States Code*, Section 7262, defines the violation of the occupational tax law relative to wagering as follows: “Any person who does any act which makes him liable for special tax . . . shall . . . be fined . . . .”

Thus, as pointed out by the District Court for the District of Columbia in *United States v. Greene*, 141 Fed. Supp. 856, 859, the offense in violation of Sections 4411 and 4412, *supra*, “. . . is not the failure to pay the special occupational tax imposed on persons engaged in the business of accepting wagers or receiving wagers for or on behalf of a person so engaged, but is the doing of any act which makes the defendant liable for the special tax . . . .” In other words, the offense is complete when the wager is accepted, without having first paid the occupational tax and registered with the Director of Internal Revenue.

A wager is essentially a contract between two or more persons to pay or receive money or property, dependent upon the outcome of some event. It becomes complete upon the meeting of the minds of those involved as to the terms and conditions thereof. Depending upon such terms, the money or property to be paid need or need not be posted. The existence of the wager is not dependent upon whether or not the winner is ultimately paid. This fact is apparently recognized by the Internal Revenue Code in its definition of a “wager” for the purposes of taxation. Section 4421(1), Title 26, *United States Code*, states:

“The term ‘wager’ means—(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers . . . .”

Reading Section 4421(1)(A) in conjunction with Section 4401(c), *supra*, it is clear that the taxable event is the making of the wager. It is clear that for the purpose of imposing and collecting the tax, the Internal Revenue

agents would not have to show that the wager had subsequently been paid, nor, conversely, would it be a defense for one engaged in the business of accepting wagers to show that he had not received the fruits of the transaction or paid his losses. Neither by statute nor regulation is the payment or receipt of the stakes of a wager denounced as a violation of the Internal Revenue Code. Actually, the Commissioner of Internal Revenue has consistently adopted the position that the profits of gambling transactions are taxable, under the income tax laws, and has as consistently been upheld in this position by the Courts.

As stated by this Court in *Campodonico v. United States* (C. A. 9), 222 F. 2d 310 at 314, cert. den., 350 U. S. 831:

“ . . . it is too well settled to require citation of authority that such winnings [from gambling] constitute taxable income.”

The automobile in the instant case was claimed only to have been used for the purpose of picking up money, the fruit of previous wagers, and not in the acceptance of the wagers themselves. The trial Judge recognized this problem in the following rationalization:

“If §4401(c) is limited to accepting wagers, then the automobile was not used in the accepting of wagers. However, the term ‘accepting wagers’ should include not only the acceptance of the wagers but also payment of money, if those who gave the wagers were successful in obtaining a payoff.” [R. 14.]

In this statement the Judge has apparently assumed that the tax is also upon one who “gives” wagers, whereas Section 4401(c), to which he makes reference, only applies to the person who “accepts” the wager.



It would appear, however, that if the trial Judge's reasoning was correct and the payment of money is included in the term "accepting wagers," so as to make subject to forfeiture an automobile used for transportation to the place of payment, the money itself would clearly be subject to forfeiture, since, under the terms of the statute, it was used in "violating the provisions of the internal revenue laws," in that no occupational tax had been paid by the acceptor of the money. If this be true, then, according to Section 7302, Title 26, *United States Code*, "no property rights shall exist in such property." Such receipts, therefore, are not income to the recipient, and hence not subject to inclusion in reporting his income for purposes of income taxation. This would modify a long line of cases holding that income from illegal sources, and specifically bookmaking, is taxable income.

We have found no reported cases where money has been forfeited by the United States by reason of violations of the Internal Revenue Code. *Corpus Juris Secundum*, relying on decisions from various states, however, states the general rule as follows:

"Money is not ordinarily itself an instrument of gambling or subject to seizure and confiscation as such an instrument, but is generally the stake for which men gamble and therefore not subject to confiscation as a gambling device, although under some circumstances money may itself be used as a gambling device, as where men gamble on the toss of a coin, and money may become subject to seizure along with regular gambling apparatus where it has become an integral part of the illegal gambling operation."

38 *C. J. S.*, p. 136.

It is submitted that the trial Judge, in his efforts to justify the forfeiture of the automobile here in question, has by judicial determination sought to put into the statute something that is not there by the clear words of the law. The acceptance of the winnings or payment of the losses resulting from the wagering transaction, not being a violation of the Internal Revenue Code, could hardly be the predicate for forfeiture of the money as being used in the "acceptance of wagers." Hence, the act of receiving the money, although some evidence of the preceding wager, would not in itself be a violation, so as to subject property used in such acceptance to forfeiture under the terms of Section 7302, *United States Code*.

Some mention should be made of the far-reaching effect of the District Court's decision, if it be upheld. For example, Sections 7201 to 7274, Title 26, *United States Code*, detail a variety of violations of the Internal Revenue Code, running the gamut from attempting to evade taxes to failure to print the factory number on packages of white phosphorus matches. Would the money and property of the alleged tax evader, or the factory and machinery of the firm which allegedly failed to print the factory number, provided the same were used in some manner in the offense or were the result or profit thereof, be subject to forfeiture, in addition to the taxes and penalties otherwise provided by law? Bearing in mind that the *quantum* of proof necessary to establish the Government's right to the civil penalty is far less rigorous than that required in a criminal prosecution, the Government could, indeed, wreak an awful vengeance on a claimed wrong-doer, but without the restriction of proof beyond a reasonable doubt, subjecting him to loss of his property without relief from the ensuing taxes and penalties.



### III.

**The Use of an Automobile as Transportation to and From the Place Where Money, the Product of Wagers Previously Made, Is Collected by One Who Has Not Paid the Wagering Occupational Tax, Is Not a Use of the Vehicle in Violation of the Internal Revenue Code.**

The Supreme Court has clearly indicated that an automobile used solely for transportation to and from the scene of an activity denounced by internal revenue laws is not itself used in such violation. In *United States v. Lane Motor Company*, 344 U. S. 630, 97 L. Ed. 622, 73 S. Ct. 459, the Court states:

“We think it clear that a vehicle used solely for commuting to an illegal distillery is not used *in* violating the revenue laws.” (Emphasis the Court’s.)

Assuming that the automobile driven by Nocita on the occasion when he picked up the money from Vincelli is the same car that was subsequently seized by the internal revenue agents, yet it cannot be said that the car was used *in* an illegal transaction. Even if the collection of the money be assumed a part of the “accepting of wagers,” the car was not used as the locale of such payment. Nor does the carrying of non-tax paid money on the person of Nocita while he drove the car so taint the vehicle as to cause the loss of its title.

### Conclusion.

It is respectfully submitted that the judgment appealed from should be reversed.

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